LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U.S.
FILED
MAY 1 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 970

GERALD VOGLINO and P. RUSSELL WILLETT, *Appellants*

v.

UNITED STATES OF AMERICA, *Appellee*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ELLSWORTH T. SIMPSON
Attorney for Appellants

917 15th Street, N.W.
Washington, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	3
Reasons for Granting Writ	6
Conclusion	8

Appendix A—Opinion of the United States Court of Appeals for the Fourth Circuit	1a
Appendix B—Opinion of the United States District Court for the District of Maryland	3a
Appendix C—Order of the United States District Court for the District of Maryland	6a

CITATIONS

CASES:

Deluxe Check Printers, Inc. v. Kelm, 99 F. Supp. 785 (D.C. Minn. 1951)	7
Haggar v. Helvering, 308 U.S. 389, 84 L. Ed. 340, 60 S. Ct. 337 (1940)	7
Jones v. Liberty Glass Co., 332 U.S. 524, 68 S. Ct. 229 (December 22, 1947)	7
Shattuck v. Gallagher, 218 Fed. 2nd 428 (C.C.A. 6, 1955)	7
United States v. American Trucking Associations, Inc., 310 U.S. 534, 84 L. Ed. 1345, 60 S. Ct. 1059 (1940)	7

STATUTES:

Internal Revenue Code (1954):	
Sec. 4461	2
Sec. 4901(a)	2
Sec. 4901(b)	2
Sec. 7302	3, 5, 7
Sec. 7325	6
Laws of Maryland, 1951, Chapter 183, Section 84D(a) and (b)	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No.

GERALD VOGLINO and P. RUSSELL WILLETT, *Appellants*

v.

UNITED STATES OF AMERICA, *Appellee*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Gerald Voglino and P. Russell Willett, appellants, pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit in the above entitled cause entered April 1, 1958.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is printed at page 1a of Appendix A to this petition The opinion of the District Court of the United States for the District of Maryland appears on page 3a of Appendix B hereto. The order of the United States District Court for

the District of Maryland appears in Appendix C hereto at page 6a.

JURISDICTION

The judgment of the Court below was entered April 1, 1958 (App. A, page 1a, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. Whether the Courts below erroneously interpreted Sections 4461, 4901(a), 4901(b), and 7302 of the Internal Revenue Code, 1954.

II. Whether the decisions of the Courts below are in conflict with applicable decisions of this Court involving construction of Federal statutes.

STATUTES INVOLVED

Internal Revenue Code (1954):

§ 4461. *Imposition of tax*

There shall be imposed a special tax to be paid by every person who maintains for use or permits the use of, on any place or premises occupied by him, a coin-operated amusement or gaming device at the following rates:

* * *

(2) $250 a year, in the case of a device defined in paragraph (2) of section 4462(a); * * *

§ 4901. *Payment of tax*

(a) *Condition precedent to carrying on* certain business. —No person shall be engaged in or carry on any trade or business subject to the tax imposed by section 4411 (wagering), 4461(2), (coin-operated gaming devices), 4721 (narcotic drugs), or 4751 (marihuana) until he has paid the special tax therefor.

(b) *Computation.*—All special taxes shall be imposed as of on the first day of July in each year, or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for 1 year, and in the latter case it shall be reckoned proportionately, from the first day of the month in which the liability to a special tax commenced, to and including the 30th day of June following.

(c) *How paid.*—

(1) *Stamp.*—All special taxes imposed by law shall be paid by stamps denoting the tax.

§ 7302. *Property used in violation of internal revenue laws.*

It shall be unlawful to have or possess any property intended for use in violating the provisions of the internal revenue laws, or regulations prescribed under such laws, or which has been so used, and no property rights shall exist in any such property. A search warrant may issue as provided in chaper 205 of title 18 of the United States Code and the Federal Rules of Criminal Procedure for the seizure of such property. * * *

STATEMENT

The following is an agreed statement of the case as submitted on appeal.

STATEMENT OF FACTS

1. On or before July 1, 1955, claimant, Gerald Voglino, purchased a tax stamp under the provisions of Section 4461(2) of the Internal Revenue Code of 1954 providing for the payment of a $250.00 tax on each of five coin-operated gaming devices owned and operated by him on the premises known as "Curley's Restaurant and Tavern", in Charles County, Maryland. The total tax paid was $1,250.00 and the stamp expired on June 30, 1956.

2. On or about the first day of May, 1956, claimant, Gerald Voglino, leased to claimant, P. Russell Willett, a business known as "Curley's Restaurant and Tavern", located in the premises owned by said Gerald Voglino. This business had been previously operated by Gerald Voglino as a sole proprietorship. One of the terms of said lease was an agreement between the parties whereby each was to share equally in the profits of the coin-operated devices and each was to bear all costs incident to the operation and maintenance thereof.

3. On or about June 12, 1956, a liquor license was transferred to P. Russell Willett, permitting him to conduct the business which he had leased from Gerald Voglino.

4. On or about June 18, 1956, claimant, Gerald Voglino, purchased federal stamps for the five (5) coin-operated devices for the period commencing July 1, 1956 and expiring June 30, 1957. On this same date, claimant, P. Russell Willett, purchased Federal Stamps for (3) coin-operated devices for the same period.

5. Beginning on June 12, 1956, R. Russell Willett became the operator of the business located on premises in which the five (5) coin-operated devices were in use. Willett had not obtained Federal stamps in his name for the five devices for the period from June 12, 1956 to June 30, 1956. Willett had not obtained stamps for the three (3) other devices which he had placed on the premises as of June 12, 1956 when he commenced operating the business.

6. On June 28, 1956, at approximately 2:20 P.M., agents of the Internal Revenue Service entered the premises known as Russell's Bar, Route 3, Waldorf, Maryland, which at that time was open for business, and asked the person behind the bar to produce the Federal excise tax stamps covering the eight "one-arm bandit" type coin-operated gaming devices then present on the premises. This person called Phillip Russell Willett, proprietor of

the establishment and one of the claimants herein, to talk with the agents. Mr. Willett produced a Federal excise tax stamp covering five machines, containing the following data:

> "Stamp No. 57811 c/o Gerald Voglino, Waldorf, Maryland. 5 COGD—Return No. 2-8824 $1250.00 expires June 30, 1956."

3

Mr. Willett failed to produce any Federal excise tax stamp on the remaining three machines. However, he did produce two receipts from the Collection Division, Washington, D. C., each dated June 18, 1956, and covering the period July 1, 1956 to June 30, 1957. One receipt was for $1,2500.00 in the name of Gerald Voglino, purporting to cover the five machines then licensed to Mr. Voglino. The second receipt for $750.00 covered the three unlicensed machines on the premises and was in the name of Phillip Russell Willett, proprietor of the aforementioned establishment. The agents were informed by Mr. Willett that no excise tax stamps had been purchased in the name of the proprietor, Mr. Willett, on any of the machines for the period from June 12, 1956 to June 30, 1956, the period during which Mr. Willett was the sole proprietor of the business.

It appears that on approximately May 1, 1956, Phillip Russell Willett had purchased this business from Gerald Voglino conditioned upon the receipt of a Charles County liquor license by Mr. Willett. The said license was received by Mr. Willett on June 12, 1956.

When informed that the Federal law required the Federal excise tax stamp to be taken out in the name of the proprietor or occupant of the business, the claimants, Mr. Voglino and Mr. Willett, stated that they had been advised otherwise by their accountant. The eight machines were then seized by the Internal Revenue agents for violation of the Internal Revenue Laws and were forfeited to the United States under Section 7302 of the 1954 Internal Rev-

enue Code. The claimants are presently claiming the five machines upon which the Federal excise tax stamp had been purchased by Mr. Voglino for the period July 1, 1955 to June 30, 1956. The claimants have posted a claim and cost bond in the amount of $250.00 in view of the fact that the machines were appraised for $375.00 and it was necessary to post such bond in order for this Court to take jurisdiction over the matter under Section 7325 of the Internal Revenue Code.

7. Under the laws of Charles County, Maryland, where the aforementioned coin-operated gaming devices were located, Mr. Willett was entitled to have only three machines on his premises, and Mr. Voglino, under said laws, would be entitled to have only five machines on any premise which he might operate. Laws of Maryland, 1951, Chapter 183, Section 84D(a) and (b), relating to the licensing of gambling devices in Charles County, provide that a license for no more than three machines shall be issued to any one person, firm or corporation under the above law, unless such person or corporation held a license for more than three machines under the laws of Maryland on January 1, 1951. On January 1, 1951, Mr. Voglino held a license for five machines and was therefore entitled to maintain five machines on his premises.

8. Claimant, Gerald Voglino and P. Russell Willett, posted a cost bond in the amount of $250.00, thereby conferring jurisdiction upon the United States District Court for the District of Maryland.

9. The value of the devices seized, excluding their contents, is $375.00. The contents amount to $63.75.

REASONS FOR GRANTING WRIT

1. The decision of the United States Court of Appeals for the Fourth Circuit and that of the United States District Court for the District of Maryland are in conflict with

applicable decisions of this Court relating to the interpretation of Federal statutes.

2. The principle that Federal statutes should be reasonably interpreted in a practical and sensible manner has been enunciated by this Court in other cases. *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 84 L. Ed. 1345, 60 S.Ct. 1059 (1940); *Deluxe Check Printers, Inc.* v. *Kelm*, 99 F. Supp. 785 (D.C. Minn. 1951); *Haggar* v. *Helvering*, 308 U.S. 389, 84 L.Ed. 340, 60 S.Ct. 337 (1940).

3. It is also well recognized that the ordinary or settled meaning of a word prevails. This, too, finds support in the decisions of this Court. *Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 68 S.Ct. 229 (December 22, 1947).

4. There is support for the proposition that doubts as to the construction of Federal statutes should be resolved in favor of the taxpayer. *Deluxe Check Printers, Inc.* v. *Kelm*, 99 F. Supp. 785 (D.C. Minn. 1951); *Shattuck* v. *Gallagher*, 218 Fed. 2nd 428 (C.C.A. 6, 1955).

5. The Court below construed the intent contained in 26 U.S.C. 7302, based upon the act of appellants in using the gaming devices in a business subject to the tax upon which the tax had not been paid. If nothing more is required to establish intent, then, it is submitted the word "intended" appearing in 26 U.S.C. 7302 is superfluous. In appellants' view, however, the word "intended" as used in that statute means that the conduct of the person upon whom the tax is imposed must have been such as to demonstrate his intent to use the devices in violation of the Federal statute. Further, the devices themselves being incapable of intent, the conduct of the individual must control with respect to that question. If the word "intended" had not been used, then, and in such event, the actual use of the device might have constituted the offense justifying the forfeiture within the meaning of Section 7302, Internal Revenue Code, 1954. The reasonable interpretation of the

word "intended", appearing in the statute, however, demands a more practical approach in the light of the circumstances prevailing herein.

CONCLUSION

The decisions of the Courts below, being in conflict with applicable decisions of this Court and, having condoned the taking of appellants' private property by forceful means, the appellants earnestly pray that this honorable Court review the judgment of the United States Court of Appeals for the Fourth Circuit.

ELLSWORTH T. SIMPSON
Attorney for Appellants

917 15th Street, N.W.
Washington, D. C.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7596.

GERALD VOGLINO and P. RUSSELL WILLETT, owners and claimants of Five (5) Coin-operated Gaming Devices and Contents ($63.75), *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the District of Maryland, at Baltimore.

(Argued March 6, 1958. Decided April 1, 1958.)

Before PARKER, Chief Judge, SOBELOFF, Circuit Judge, and HOFFMAN, District Judge.

Ellsworth T. Simpson for Appellants, and John R. Hargrove, Assistant United States Attorney, (Leon H. A. Pierson, United States Attorney, on brief) for Appellee.

PARKER, Chief Judge:

This is an appeal from a judment forfeiting five coin-operated gaming devices, which had been operated on premises leased by appellant Willett from appellant Voglino. The premises were acquired by Willett by lease from Voglino on June 12, 1956; and the five gaming devices, which were on the premises at that time, were allowed by Voglino, the owner, to remain on the premises under an agreement that he and Willett were to share equally in the profits and losses arising from their operation. Voglino had paid the tax imposed for the year ending June 30, 1956 by 26 USC 4461(2); but no tax was paid by Willett for the period from June 12 to June 30, 1956, during which he was the occupant of the premises and forbidden by 26 USC 4901 to

engage in the business without payment of the tax. The machines were ordered forfeited under 26 USC 7302 on the ground that when possessed by Willett they were intended for use by him in a business in which he was forbidden to engage without paying the tax. We think that this decision was correct for reasons adequately stated in the opinion of the District Judge. See 154 F. Supp. 731. The fact that Voglino had paid taxes for the year ending June 30 for carrying on a gaming business in which the machines were operated did not avail Willett; for the tax was imposed on the individual engaging in the business, not on the machines, and the payment of the tax by the individual was a condition precedent to his right to carry on the business. 26 USC 4901(a).

Appellants made three contentions: (1) that Willett was not liable for the tax for the month of June 1956 because he did not occupy the premises during the whole of that month; (2) that the intent required by the statute was not established; and (3) that the statute under which the tax was imposed is unconstitutional. There is no merit in any of these contentions. Section 4901(b) expressly provides that the tax shall be computed from the first day of the month in which liability for the tax commenced. The intent required by the statute, 26 USC 7302, is that the gaming devices be used in the business subject to tax upon which the tax has not been paid. As to constitutionality, there can be no question as to the power of Congress to impose a tax on the carrying on of the business in which the machines were operated. *United States* v. *Kahriger*, 345 U.S. 22.

Affirmed.

(Chief Judge Parker, who prepared this opinion, died before the opinion was announced.)

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. 9307

UNITED STATES OF AMERICA

v.

FIVE (5) COIN-OPERATED GAMING DEVICES AND CONTENTS ($63.75)

Filed: September 23, 1957.

Opinion

THOMSEN, Chief Judge.

The government seeks the condemnation and sale, under 26 U.S.C.A. 7302, of five gaming devices and contents on the ground that the special tax imposed by sec. 4461 had not been paid by the person who maintained them for use or permitted their use on premises occupied by him, as required by secs. 4461 and 4901. Claimants Voglino and Willett contend that the machines are not "property intended for use in violating the provisions of the Internal Revenue Laws, or regulations prescribed under such laws", and were therefore not subject to seizure and forfeiture under sec. 7302.

* * * * *

The machines were seized by agents of the Internal Revenue Service on June 28, 1956.

On July 1, 1955, and for ten months thereafter, Voglino owned a building in Waldorf, Charles County, Maryland, in which he operated a business known as "Carley's Restaurant and Tavern". In connection with this business he maintained the five gaming devices in question, commonly called "one-arm bandits". He purchased in his own name, at a cost of $250 each, the excise tax stamps required by

secs. 4461 and 4901, for the period from July 1, 1955 to June 30, 1956.

On May 1, 1956, Voglino leased the premises to Willett, who operated the business after June 12, 1956, the date on which the liquor license was transferred to his name. Although there was a provision in the lease that the parties were to share in the profits of the coin-operated devices, it is not disputed that after June 12, 1956, Willett was the person who maintained the devices for use or permitted their use on premises occupied by him, within the meaning of sec. 4461 and who engaged in or carried on the business within the meaning of sec. 4901.

However, Willett did not purchase any stamps nor pay the tax in respect of these machines for the month of June, 1956, as required by those sections. Three other gaming devices, seized on the premises at the same time, but not involved in this case, bore no stamps at all. On June 16, 1956, stamps for the year July 1, 1956 to June 30, 1957 had been purchased for all eight machines: for the five involved in this case in the name of Voglino, and for the other three in the name of Willett. This was apparently done in an attempt to evade the local law in Charles County, which would have permitted Voglino to maintain five gaming devices if he had remained in charge of the premises, but limited Willett as a new licensee to three such devices. See Laws of Maryland, 1951, ch. 183, sec. 84D(a) and (b).

On July 2, 1956, the five stamps issued to Voglino for the period July 1, 1956 to June 30, 1957 were transferred to the name of Willett, this permitted Willet to use the stamps on devices obtained as replacements for the five seized machines.

Voglino and Willett admit that Willett was obligated to pay a tax for the month of June, 1956, in respect of the five machines seized in this case; but Voglino testified that they did not know this at the time, and believed that the

payment by Voglino of a tax in respect of those machines for the year ending June 30, 1956, obviated the necessity of Willett paying any tax for the month of June, 1956. Willett did not testify. Claimants contend that they had no intention of violating the Federal law and, therefore, that the machines were not subject to seizure and forfeiture.

In view of the facts set out above, I doubt their good intentions. But even if claimants had no intention of violating the Federal law, and misunderstood its purpose and effect, it does not follow that the machines were not subject to seizure and forfeiture. Sec. 4901(a) clearly provides that no person shall be engaged in or carry on any trade or business subject to the tax imposed by any one of a number of sections, including sec. 4461(2), until he has paid the special tax therefor. When a person commences any such trade or business during the fiscal year, sec. 4901(b) provides that the tax shall be reckoned proportionately, from the first day of the month in which the liability to a special tax commenced. Payment of the tax is required prior to engaging in the business. *Lewis* v. *United States*, 348 U.S. 419, 421; *United States* v. *Ferro*, (D.C. Conn.) 126 F. Supp. 958. See also *United States* v. *Kahriger*, 345 U.S. 22.

Sec. 7302 begins: "It shall be unlawful to have or possess any property intended for use in violating the provisions of the internal revenue laws, or regulations prescribed under such laws, or which has been so used, and no property rights shall exist in any such property." The word "intended" in that sentence does not refer to an intention to evade the tax, but to the use to which the machines are to be put if they have not already been so used. If a machine is intended to be used for gaming purposes and the operator of the business has not paid the tax, it may be seized and forfeited, even though the government may not be able to prove that the particular machine has been so

used. The operator's intention with respect to paying the tax is immaterial; the question is whether he has paid it.

In the instant case, Willett had not paid the tax imposed on him as the operator of the business during June, 1956. The gaming devices were subject to seizure and forfeiture on June 28, 1956, and the relief prayed by the government must be granted.

ROSZEL C. THOMSEN
Chief Judge,
U. S. District Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. 9307

UNITED STATES OF AMERICA, *Libellant,*

v.

FIVE (5) COIN-OPERATED GAMING DEVICES AND CONTENTS ($63.75)

iled September 25, 1957

Order

The above-entitled case having come on for trial before the Court on September 12, 1957, and testimony of witnesses and argument of counsel having been heard, it is hereby

ORDERED, ADJUDGED AND DECREED this 25th day of September, 1957, in accordance with the written opinion of this Court filed on September 23, 1957, that all property rights heretofore existing in and to the five gaming devices and contents described in the libel as:

Description	Contents
25¢ #503901	$12.25
25¢ #503413	12.00
5¢ #X-507819	12.35
5¢ #506762	11.60
5¢ #507670	15.55
	$63.75

be and they are hereby condemned, and the said five gaming devices and contents are herewith forfeited to the United States, the costs of these proceedings to be assessed against the claimants, Gerald Voglino and P. Russell Willett.

And It Is Further Ordered that the United States Marshal for the District of Maryland sell said five gaming devices at public auction after advertising said sale of said gaming devices once a week for two consecutive weeks in a newspaper published in Charles County, Maryland, and in the Baltimore Sun, the proceeds of said sale, after deducting the expenses of keeping and selling said gaming devices, to be paid into the Treasury of the United States.

And It Is Further Ordered that the contents of said gaming devices in the amount of $63.75 hereby forfeited be paid by the United States Marshal into the Treasury of the United States.

In the event an appeal is taken from this Order, the United States Marshal shall postpone such sale of said five gaming devices and the payment of the contents thereof ($63.75) into the Treasury of the United States pending a final decision in this matter.

Roszel C. Thomsen
Chief Judge,
United States District Court